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MISCELLANEOUS.

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 41.

LENORE FOMAN,
Plaintiff-Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Defendant-Respondent.

BRIEF FOR PLAINTIFF-PETITIONER.

Opinions Below.

The December 16, 1960, memorandum opinion of the district court (R. 6-8) is unreported. The opinions of the Court of Appeals (R. 12-15; 20-22) are reported at 292 F. 2d 85.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 26, 1961 (R. 15). A timely petition for rehearing was filed on July 7, 1961 (R. 16-19), and denied on August 17, 1961 (R. 22). A petition for a writ of certiorari was filed with this Court November 14, 1961, and allowed January 8, 1962 (R. 22). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.[1]

1. Is an undesignated motion to vacate judgment which may properly be construed under either of two rules—59(e) or 60(b)—properly construed under that rule (59) which forecloses a disposition of the case on the merits rather than the rule (60) which permits such disposition?

2. After a notice of appeal from judgment is filed and jurisdiction taken by the Court of Appeals, the district court denied a post-judgment motion and the Court of Appeals affirmed this denial. Are these actions by the courts below properly reviewable in this Court?

3. Where a first notice of appeal from judgment is premature and a second notice is filed which refers only to the denial of post-judgment motions, and appellant indicates in a Statement of Points an intention to appeal from the judgment, is that judgment properly before the Court of Appeals?

4. Where a complaint is drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit, does a district judge in that Circuit, after refusing to adhere to the decision and dismissing the complaint for failure to state a claim, abuse his discretion by denying a motion to amend the complaint?

Statutes and Rules Involved.

United States Code, Title 28, § 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, § 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court

[1] Unless otherwise noted, all references to "rule" or "rules" refer to the Federal Rules of Civil Procedure, 28 U.S.C.

of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

United States Code, Title 28, § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

United States Code, Title 28, § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure.

Rule 1:

". . . [These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8(f):

"All pleadings shall be so construed as to do substantial justice."

Rule 15(a), (c):

(a) ". . . and leave [to amend] shall be freely given when justice so requires."

(c) "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Rule 54(c):

". . . Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 59(e):

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 73(b):

"The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. . . ."

Statement of the Case.

On June 14, 1960, plaintiff, a citizen of the State of New York, filed her complaint in this action against the defendant, a citizen of the Commonwealth of Massachusetts, in her legal capacity as executrix under the will of Wilbur W. Davis. In her complaint, filed in the United States District Court for the District of Massachusetts, plaintiff alleged that the matter in controversy exceeded the sum of ten thousand dollars, exclusive of interest and costs, jurisdiction in the district court being based upon diversity of citizenship under 28 U.S.C. § 41(1).

In her complaint (R. 2) plaintiff alleged in a single count an oral agreement with her father, the decedent,

Wilbur W. Davis, whereby the plaintiff agreed to care for her mother, decedent's first wife, and to pay all expenses for her care and maintenance for as long as she lived. The complaint further alleged that the decedent, in turn, agreed to make and leave no will, to the end that the plaintiff, as his only child, would take that portion of his estate to which she would be entitled under the intestacy laws of Massachusetts.

In setting forth her cause of action in a single count based upon the oral agreement, plaintiff relied upon *Cleaves* v. *Kenney*, 63 F. 2d 682 (1st Cir. 1933) (R. 8; Brief for Appellee, pp. 6, ff.; Brief for Appellant, pp. 5, ff.), which held that an oral agreement to destroy a will and codicil and die intestate did not fall under the Massachusetts statute of frauds.

Plaintiff further alleged that she assumed the liability to a sanatorium for the care of the decedent's wife, her mother; that she paid all charges so incurred; and, when it became necessary to move her mother from the sanatorium to her own home, she did so and there continued to care for and provide support, maintenance, medical attendance and nursing for her until the time of her death. Allegedly, these were all the things required of plaintiff under her alleged agreement with the decedent.

Plaintiff further alleged that after the death of decedent's wife he married the defendant, Elvira A. Davis; that thereafter he made a will which, except for a $5,000 legacy to a brother, devised and bequeathed his entire estate to the defendant; and that thereafter he died. Plaintiff, in this action, prayed for judgment in an amount equal to the portion of the decedent's estate which she would have re-

ceived if the decedent had neither made nor left a will as allegedly agreed.

On August 11, 1960, defendant filed her answer and motion to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. By memorandum of decision dated December 16, 1960, the district judge allowed the motion (R. 6-8), declining to follow the holding in *Cleaves* v. *Kenney, supra;* and judgment dismissing the complaint was entered December 19, 1961 (R. 9).

On December 20, 1960, plaintiff filed motions to vacate the judgment of dismissal and to amend her complaint (R. 9-10). While these motions were pending before the district judge, the plaintiff, apprehensive lest the time allowed for an appeal should expire, filed a notice of appeal on January 17, 1961, from the judgment of dismissal entered on December 19, 1960 (R. 11). On January 23, 1961, the district judge denied plaintiff's motions to vacate judgment and for leave to amend and on January 26, 1961, plaintiff filed a second notice of appeal from the order ~~denying~~ these motions (R. 11).

Upon motion by plaintiff, assented to by defendant, the Court of Appeals on February 24, 1961, ordered the two appeals consolidated. Subsequently, in compliance with Rule 75(d), F.R.C.P., 28 U.S.C. and Rule 24(2) of the Rules of the United States Court of Appeals for the First Circuit, plaintiff furnished to the court and the defendant "a statement of points" upon which she intended to rely on appeal (App. D., Pet. for Cert., p. 37).

In due course the parties filed briefs on appeal with the Court of Appeals, in which were argued the issues whether

the Massachusetts statute of frauds constituted a bar to the action and whether the district judge had committed reversible error in denying plaintiff's motions to vacate the judgment of dismissal and to amend her complaint. In addition, defendant argued that, after the first notice of appeal was filed, the district court was deprived of jurisdiction over the case. *Neither* party, however, argued the issue of the scope of the appeal, which was first raised by the Court of Appeals, *sua sponte*, at the oral argument on appeal.

By judgment entered June 26, 1961 (R. 15), the Court of Appeals ordered judgment dismissing the appeal from the judgment of the district court and affirming the district court's order of January 23, 1961, which denied plaintiff's motions to vacate judgment and to amend her complaint. The court held:

First—Although the motion to vacate judgment could have been filed under either Rule 59(e) or Rule 60(b), in the absence of a designation by the movant "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired."

Second—Since a motion under Rule 59 terminates the running of time for taking an appeal (Rule 73(a)), the notice of appeal filed on January 17, 1960, during the pendency of the motion to vacate, was premature and, presumably, of no effect.

Third—The second notice of appeal, referring only to the order denying the motions to vacate and to amend and not to the original judgment, must therefore, with respect to such judgment, be dismissed.

Fourth—Since the Court of Appeals found "nothing presented by the record to show the circumstances which were before the district court for its consideration" in ruling on plaintiff's motions to vacate judgment and to amend the complaint, the court could not say that the district court had abused its discretion.

On July 7, 1961, plaintiff filed a timely petition for rehearing with the Court of Appeals in which she argued that the second notice of appeal should be treated as appealing from the judgment rather than the order denying the post-judgment motions. Furthermore, plaintiff argued, the ruling of the Court of Appeals was in violation of the basic liberal principles of modern, enlightened practice and procedure in the federal courts. The court denied rehearing (R. 20), saying that "the intent to appeal from the judgment" could not reasonably be inferred from the notice of appeal. "'. . . [P]laintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal."

Plaintiff filed her petition for a writ of certiorari with this Court on November 14, 1961; and on January 8, 1962, the petition was granted (R. 22).

Summary of Argument.

By way of introduction we attempt to set out the basic principle which underlies every aspect of this appeal, namely that, in the administration of justice in the federal courts today, procedure is subordinate to the ends of substantive justice which, in the present context, means the disposition of cases on their merits. The arguments that follow seek to apply this principle to the instant case.

In Part I, plaintiff argues that, since her undesignated motion to vacate the district court's judgment of dismissal could be construed under either Rule 59 or Rule 60, and construction under the former forecloses a disposition of the case on its merits while construction under the latter permits such disposition, it is the duty of the Court to construe the motion under Rule 60 in order to reach and decide the merits of the case. Courts have time and again treated motions as Rule 60 motions where they were, as here, undesignated and even where they purported to have been made under Rule 59. In other areas, courts have almost uniformly so characterized pleadings and motions as to save the substantive rights of the pleader or moving party and decide the case on its merits rather than on the basis of procedural niceties.

In Part II plaintiff assumes that the motion to vacate judgment is treated by this Court as a Rule 60 motion and explores the implications of such treatment which defendant may seek to raise. Specifically, the defendant has earlier raised the point that, if the motion is treated as a Rule 60 motion, it will not suspend the finality of the judgment for purposes of appeal, and plaintiff's first notice of appeal would have been timely and would have removed jurisdiction of the case to the Court of Appeals. The district court, therefore, the defendant contends, would be without jurisdiction to rule on the pending motion. Plaintiff argues that no such complications arise from a Rule 60 treatment of its motion, for either of two reasons: First, a district court may be said to retain a limited jurisdiction to entertain and deny (as was the case here) a motion pending an appeal; the courts that have faced this specific question have so resolved it and it is a resolution that is sound in principle and responsive to the policies and demands of

appellate procedure. Second, even if this Court should choose not to accept the "limited jurisdiction" approach, yet, as an appellate court, with plenary powers, it can and should, as it has on many occasions, dispose of the entire case, including matters not ruled on below. In the instant case, where a motion was in fact made and in fact ruled on by two courts below, it would be contrary to sound appellate practice to remand the case for rulings which have already been made.

For the purposes of Part III, plaintiff assumes, *arguendo*, that her motion to vacate judgment is properly held to have been a Rule 59 motion and that her first notice of appeal (from the judgment), filed during the pendency of the motion and before the judgment became final, was premature and, presumably, a nullity. In Part III we argue that the second notice of appeal, although referring only to the denial of the post-judgment motions (to vacate judgment and for leave to amend), was sufficient, under the circumstances, to effect an appeal from the judgment itself. These circumstances are that the intention to appeal from the judgment (which seems to be the chief concern of the Court of Appeals) clearly appears from the record as a whole, more particularly from the first notice of appeal and from the plaintiff's Statement of Points to be Relied Upon on Appeal. This Court as well as a great number of Courts of Appeals have reviewed a judgment on appeal although the notice referred only to some post-judgment order. In other cases where no formal notice of appeal was filed at all, the courts found a clear intention to appeal and treated pleadings otherwise designated as the necessary notice of appeal. We submit that in the instant case, there being no prejudice to the defendant and a clear intention to appeal from the judgment of dismissal, the Court of Appeals should have been less concerned with strict in-

terpretation of procedural rules and more with substantive justice, namely, a disposition of the case on its merits.

Part IV deals with the district court's denial, without opinion, of plaintiff's motion to amend the complaint by adding a count in quantum meruit and the affirmance of that denial by the Court of Appeals. We argue first (subpart A) that recovery could properly have been had on the complaint as it stood, since a court is bound to give a party appropriate relief even if other and possibly unavailable relief is all that is prayed for. Specifically, it seems clearly established that recovery may be had on a quantum-meruit basis although the complaint is drawn in terms of money damages for a breach of contract. Assuming, however, that an amendment was necessary or desirable, we next argue (subpart B) that it was an abuse of discretion for the district court, in the circumstances of the instant case, to refuse permission to amend. The complaint had been drawn along breach of contract lines on the basis of an unreversed decision of the Court of Appeals and in reliance that the district court would, as it was bound to do, follow that decision. When the district court chose to depart from the authority of the decision, it should have permitted the plaintiff to amend the complaint to add a count in quantum meruit.

In sum, this entire case is based on the principle stated at the beginning of this Summary. Where a federal court faces a choice between possible alternatives which will determine whether the case is to be decided on its merits or on some procedural technicality, we submit that it is the duty of the court in every instance to choose that alternative which permits a disposition on the merits. The decisions below are contrary to the most significant trend in the growth of the administration of justice in the federal

courts, a trend which began with the advent of the Federal Rules. If permitted to stand, the decisions will constitute a long step backward.

Argument.

Introduction.

Two basic premises constitute the keystone of this entire appeal:

First—Judicial procedure and its various constituent rules are not ends in themselves; they "are but means to an end, means to the enforcement of substantive justice . . ."[2] Procedure, then, in this sense, is subordinate to the ends of substantive justice—"a handmaid rather than mistress."[3]

Second—The constituent of substantive justice which concerns us here is that cases shall be decided "*on their merits* as *expeditiously* as possible."[4]

Throughout this brief we refer again and again to these premises—these "basic principles" which give meaning to the specific rules of federal procedure. Perhaps it would be proper to ask this Court's indulgence for such monotonous repetition. But the courts below, by their disregard of basics in rendering their decisions, by their foreclosing a hearing on the merits on the ground of procedural niceties

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[2] Charles E. Clark, "Fundamental Changes Effected by the New Federal Rules I," 15 Tenn. L. Rev. 551 (1939).

[3] *In re Coles* [1907], 1 K.B. 1, 4, per Collins, M.R.

[4] Holtzoff, "A Judge Looks at the Rules After Fifteen Years of Use," 15 F.R.D. 155 (1954). (Emphasis supplied.) See also Address of Chief Justice Hughes, 21 A.B.A.J. 340 (1935).

where a hearing on the merits was clearly possible with little, if any, judicial strain, have made it imperative that we state and restate our reliance on the basic principles of federal procedure.

This Court has itself recently articulated the principles upon which we rely:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957).

Plaintiff respectfuly submits that the courts below have not shown a proper regard for these basic precepts of federal procedure, and their decisions must be reversed by this Court.

I. An undesignated motion to vacate judgment which may properly be construed under either of two rules— 59(e) or 60(b)— should be construed under that rule which results in permitting a disposition of the case on the merits rather than the rule which forecloses such disposition.

Recognizing that plaintiff's motion to vacate the judgment of dismissal could have been filed under either Rule 59(e) or Rule 60(b) (R. 14), and realizing, as it must, that plaintiff was not bound to cite the particular rule relied upon,[5] and noting that, if construed under Rule 59, the

[5] Rule 7(b), which deals with the form of motions, does not require reference to a particular rule under which a motion is made.

appeal from the judgment below would not properly be before the court (as it would be if the motion were construed under Rule 60) (R. 14), yet the Court of Appeals decided that "the full context of the rules" dictated that the motion should be held to have been made under Rule 59.

The full context of the rules, we submit, requires that, in construing pleadings, courts shall disregard harmless error (Rule 61; 28 U.S.C. § 2111), and that pleadings shall be construed "to secure the just, speedy, and inexpensive determination of every action" (Rule 1) and so "as to do substantial justice" (Rule 8(f)). The decision of the Court of Appeals, resulting as it does in a dismissal of the action purely on matters of pleading and without reaching the substance of plaintiff's grievance, disregards, we submit, the purpose of pleading as articulated by this Court — "to facilitate a proper decision on the merits." *Conley* v. *Gibson, supra.*

In order to reach the merits, the Court of Appeals should have characterized plaintiff's undesignated motion to vacate judgment under whatever applicable rule would have yielded that desirable result, be it Rule 59, Rule 60, or some other rule. But this larger and more significant principle escapes the Court of Appeals; rather, by framing the issue narrowly it rests its holding, in part, on its inability "to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken before a disposition of the motion would be timely" (R. 14-15). But other Courts of Appeals, in harmony with the principle expressed by this Court in the *Conley* case, and with awareness of the alternative results of characterizing a pleading one way or another, have uniformly ruled in favor of a characterization which permits a decision on the merits.

Thus Judge Frank in the Second Circuit held that a motion for a new trial[6] should have been treated as a Rule 60(b) motion, thus rendering timely the plaintiff's appeal from the denial of the motion. *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (1955).[7] Judge Clark of the same Circuit has said that defendant's motions to serve supplemental pleadings and to reargue plaintiff's motion for summary judgment earlier granted might, "in the interest of justice," be treated as a Rule 60(b) motion if any of the grounds in that rule were met. *United States* v. *Wissahickon Tool Works, Inc.*, 200 F. 2d 936, 938 (1952). Other courts have treated variously designated pleadings as if they were motions under Rule 60(b). Thus the Third Circuit has deemed a letter to the district court to be a motion under 60(b), *United States* v. *Backofen*, 176 F. 2d 263 (1949); the Sixth Circuit has treated an independent action as a 60(b) motion, *Sebastiano* v. *United States*, 103 F. Supp. 278, *aff'd*, 195 F. 2d 184 (1952); the Seventh Circuit has considered a petition for "review and rehearing" as a Rule 60(b) motion, *In re Marachowsky-Stores Co.*, 188 F. 2d 686 (1951); and a district court in the Ninth Circuit has treated a petition for a writ of coram nobis as a 60(b) motion. *In re Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

And when it serves the end of deciding cases on their merits, courts will *reject* the Rule 60 characterization. In *Southern States Equipment Corp.* v. *USCO Power Equipment Corp.*, 209 F. 2d 111 (5th Cir. 1953), appellant

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[6] Rule 59 is captioned: "New Trials . . ."

[7] The motion for a new trial was filed twenty-one days after judgment; the notice of appeal was filed sixty-four days after judgment, but within the thirty-day appeal period after order denying the motion. See also *Sternstein* v. *"Italia,"* 275 F. 2d 502 (2d Cir. 1960).

filed a motion expressly purporting to be under Rule 60(a), requesting the court to correct a "clerical error in the judgment." This error was corrected and the judgment ordered re-entered as corrected. Within thirty days of the second entry of judgment, but more than thirty days after the first, appellees filed notice of appeal from certain portions of the corrected judgment adverse to them. Appellant contended that, since a Rule 60 motion does not toll the running of time for appealing, appellees' notice, coming more than thirty days after original entry of the judgment appealed from, was untimely and the appeal should be dismissed. The court's disposition of the issue thus presented indicates, we submit, the proper approach in the instant case:

> "Without dealing with the various ramifications and procedural complexities of the problem at length and considering it only in light of requirement of Rule 8(f), F.R.C.P., that 'all pleadings shall be so construed as to do substantial justice', we hold that appellant's motion filed June 19, 1952, while purporting to be a motion under Rule 60(a), will for present purposes be treated as a motion to alter or amend the judgment under Rule 59(e), and that appellant's motion to dismiss the cross-appeal is denied." 209 F. 2d at 116-117.[8]

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[8] See also *Hadden* v. *Ramsey Products, Inc.*, 196 F. 2d 92 (2d Cir. 1952), where the court had before it certain petitions attacking a final judgment, it apparently viewing these petitions as permitted under Rule 60(b). These petitions, the court said, "may be treated as an independent action to obtain equitable relief" from the judgment; and this, notwithstanding that "Rule 3 states that an action is commenced by filing a complaint" and that Rule 4 contemplates that a summons shall be issued and served. The court noted that, despite technical requirements not having been met, "it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the district court." 196 F. 2d at 95.

The basic principles in favor of liberality and against hypertechnicality, the recognition and effectuation of the primary purpose of pleadings as articulated by this Court in *Conley, supra,* are evident in cases involving matters other than the two particular rules involved in the instant case. In order to achieve substantive justice, the courts have again and again disregarded labels and so characterized pleadings and motions as to permit a disposition of cases on their merits. Thus a petition for rehearing has been held equivalent to a motion for a new trial. *Fraser* v. *Doing,* 130 F. 2d 617 (D.C. Cir. 1942). *The Astorian,* 57 F. 2d 85, 87 (9th Cir. 1932). An acknowledgment of service of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal which was not timely filed with the court. *Crump* v. *Hill,* 104 F. 2d 36 (5th Cir. 1939). In *Jordan* v. *United States District Court,* 233 F. 2d 362, 365 (D.C. Cir. 1956), a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal. And an application made in the appellate court for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal" and sufficient to give the court jurisdiction. *Blunt* v. *United States,* 244 F. 2d 355, 359 (D.C. Cir. 1957). *Burdix* v. *United States,* 231 F. 2d 893, 894 (9th Cir. 1956). *Roth* v. *Bird,* 239 F. 2d 257 (5th Cir. 1956). In *United States* v. *Caruso,* 272 F. 2d 799 (3d Cir. 1959), a pleading captioned "Exceptions to Order for Distribution" was treated as equivalent to a motion under Rule 59(e). And, finally, a motion for summary judgment (Rule 56(b)) was treated as a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(c), mentioned by the court). *Dunn* v. *J. P. Stevens & Co.,* 192 F. 2d 854 (2d Cir. 1951).[9]

[9] It is interesting to note that this treatment of a pleading as something other than what it is labelled is carried into the Judicial

The citation (R. 14) by the Court of Appeals of *Chicago & N.W. Ry. Co.* v. *Davenport*, 95 F. Supp. 469 (S.D. Iowa 1951) as criticized by Professor Moore is eloquent of the court's discounting the basic principles of federal procedure in favor of the technical distinctions. In that case the defendant's motion to dismiss the action on the ground of improper venue was granted and the case dismissed on November 27, 1950. Within ten days plaintiff moved to vacate the dismissal and to have the action transferred to the proper district, and, relying on Rule 60(b)(6), the district court granted the motion. The criticism of this reliance on Rule 60, 7 Moore, Federal Practice, ¶ 60.27 [2], p. 306, n. 23 (2d ed. 1955), is that it was unnecessary, since the motion had been made within the ten-day period and relief could have been granted under Rule 59(e). But it did not make any difference under which rule the motion was construed; the issue was one of purely academic interest. The instant case is vastly different!

It is interesting to note that the court in the *Davenport* case showed concern with the basic principles which we are here espousing when it stated:

> "It is the opinion of the court that it is in the interest of justice and will promote the just, speedy and inexpensive determination of the question involved to grant the relief asked by vacating the order of dismissal . . ." 95 F. Supp. at 472.

We submit that the reliance of the Court of Appeals on the criticism of a moot point in *Davenport* is entirely misplaced

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Code. Section 2103 of Title 28, U.S.C. provides that this Court shall regard and act upon an appeal from a state court improvidently taken as a petition for a writ of certiorari.

in this case, for here that point, the 59-60 distinction, is of decisive significance. More appropriately, the court should have taken note of the above-quoted statement of principle from *Davenport* and applied it in deciding this case.

Finally, it is interesting to note defendant's view of plaintiff's motion to vacate (although it is expressed for her own purposes on appeal):

> "In general, motions to vacate judgment in the District Court are governed by Rule 60 of the Federal Rules of Civil Procedure, and, although the appellant does not say so explicitly, it is apparent from her brief . . . that in the matter of her motion to vacate judgment she was relying on the 'other reason' clause in paragraph (b) of Rule 60." Brief for Appellee, p. 10.

II. THE DISTRICT COURT'S DENIAL OF PLAINTIFF'S MOTION TO VACATE JUDGMENT (AND THE AFFIRMANCE THEREOF BY THE COURT OF APPEALS) IS PROPERLY SUBJECT TO REVIEW BY THIS COURT NOTWITHSTANDING THE FACT THAT SUCH DENIAL WAS MADE AFTER AN APPEAL HAD BEEN PERFECTED, EITHER ON THE GROUND—

(1) THAT THE DISTRICT COURT RETAINED LIMITED JURISDICTION TO CONSIDER AND DENY THE MOTION AND SUCH ACTION IS THEREFORE REVIEWABLE ON APPEAL, OR

(2) THAT THIS COURT OUGHT TO DISPOSE COMPLETELY OF ALL ASPECTS OF THE CASE IN THE SOUND EXERCISE OF ITS PLENARY APPELLATE JURISDICTION.

(1)

The defendant may contend, as she has earlier, that if plaintiff's motion to vacate the judgment of dismissal is

treated as a Rule 60(b) motion, "the District Court would have been deprived of jurisdiction to entertain" such motion, since the first notice of appeal would have given the Court of Appeals jurisdiction over the case. See Br. in Opp. to Pet., pp. 4-5. The implication which defendant seeks to draw from this assertion is unclear. A case cited by the defendant, *Daniels* v. *Goldberg*, 8 F.R.D. 580 (S.D. N.Y.), *aff'd on other grounds*, 173 F. 2d 911 (2d Cir. 1949), makes the point that Rule 60 does not "confer on a district court the power to *vacate* a judgment after an appeal has been filed." (Emphasis supplied.) If this is the contention of the defendant, *i.e.*, that the district court is without jurisdiction after a notice of appeal has been filed and served to *grant* a motion to vacate judgment, then we find ourselves in agreement. If her contention, however, is that the district court is without jurisdiction to entertain and *deny* the motion and that its action in doing so in the instant case cannot now be reviewed by this Court, we submit that such position is without merit in principle and is contrary to the authorities that have considered the specific question.

This specific question, whether a district court retains a limited jurisdiction to consider and deny a post-judgment motion pending appeal, has been answered in the affirmative by the courts in which the question has come up. In *Ferrell* v. *Trailmobile, Inc.*, 223 F. 2d 697 (5th Cir. 1955), the court noted that, when a Rule 60(b) motion is filed pending appeal, "the district court retains jurisdiction to consider and deny such motions, but that, if it indicates that it will grant the motion, the appellant should then make a motion in the Court of Appeals for a remand of the case in order that the district court may grant such motion." 223 F. 2d at 699. This limited jurisdiction approach

has been followed as well by the District of Columbia Circuit,[10] the Seventh Circuit,[11] and the Ninth Circuit.[12]

The "limited jurisdiction" approach affords an effective compromise between two competing policies in the area of judicial and appellate administration: One, that only one court shall have jurisdiction over a case at any one time, and the other, that the case shall be fully developed in the trial court before the record reaches the appellate tribunal. There is, by this approach, eliminated needless remanding to lower courts for rulings on motions which such courts could well have considered without interfering with the jurisdiction of the appellate court. The advantages of the "limited jurisdiction" approach are well stated in a note, "Disposition of Federal Rule 60(b) Motions During Appeal," in 65 Yale Law Journal 708 (1956).

(2)

This Court need not, however, accept the "limited jurisdiction" approach in order to make a complete disposition of this case, including review of the district court's denial of plaintiff's motions and the affirmance by the Court of Appeals of such denial. This Court has on several occasions resorted to its plenary appellate jurisdiction to rule on matters not considered below and not argued to the Court. In *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 567-568 (1931), this Court chose to review all these matters, stating:

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[10] *Smith* v. *Pollin*, 194 F. 2d 349 (1952).

[11] *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 260-261 (1960).

[12] *Grecar* v. *Grecar*, 288 F. 2d 466 (1961). See also *Perlman* v. *322 West Seventy-Second Street Co.*, 127 F. 2d 716, 719, text at n. 2 (2d Cir. 1942); *Herring* v. *Kennedy-Herring Hardware Co.*, 261 F. 2d 202, 203-204 (6th Cir. 1958).

> "The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court."

The Court has ruled similarly in other cases on matters not specifically before it for one reason or another.[13]

Thus, even if it is held that the district court was without jurisdiction to entertain and deny plaintiff's motion to vacate judgment, and even if this is held to have deprived the Court of Appeals of jurisdiction to rule on the denial, yet as a fact such motion was filed and ruled on by both courts below, and it lies well within the proper exercise of its plenary appellate jurisdiction for this Court to consider and rule on issues raised by the denial of the motion, especially where such exercise would avoid prolonged and circuitous proceedings.[14]

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[13] *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957): "Although the District Court did not pass on the other reasons advanced for dismissal of the complaint we think it timely and proper for us to consider them here."; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cole* v. *Ralph*, 252 U.S. 286, 290 (1920): "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better . . ."; *Watts, Watts & Co., Ltd.*, v. *Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918); *Lamar* v. *United States*, 241 U.S. 103, 110-111 (1916); *Delk* v. *St. Louis & San Francisco Railroad Co.*, 220 U.S. 580, 588-590 (1911); *Boston & Maine Railroad* v. *Gokey*, 210 U.S. 155, 162 (1908).

[14] The appellate court faced the problem of ruling on decisions made below on questions not properly before the court because of the state of the pleadings in *A. L. Mechling Barge Line* v. *Bassett*, 119 F. 2d 995 (7th Cir. 1941). The court, noting the situation, de-

III. WHERE A FIRST NOTICE OF APPEAL FROM A JUDGMENT IS PREMATURE, A SECOND NOTICE REFERRING ONLY TO THE DENIAL OF A POST-JUDGMENT MOTION IS SUFFICIENT, UNDER THE CIRCUMSTANCES, TO EFFECT A VALID APPEAL FROM THE JUDGMENT.

(For the purposes of this argument we assume, *arguendo*, that plaintiff's motion to vacate was properly held to have been a Rule 59 motion. As such, it was not appealable, *i.e.*, it was subject to review only on the issue of abuse of discretion. See 6 Moore, Federal Practice, par. 59.15, pp. 3890 ff. (2d ed. 1955).)

In dismissing plaintiff's appeal from the district court's judgment dismissing the action the Court of Appeals held that, since plaintiff's second notice of appeal (R. 11) did not refer to the judgment, but rather to the denial of the post-judgment motions, such notice was insufficient to bring the judgment before the court on review. This holding is in conflict with the decisions of this Court and represents a significant departure from a line of cases in the various Courts of Appeals.

In *United States* v. *Ellicott*, 223 U.S. 524, 538 (1912), this Court held that a notice of appeal referring to "the judgment rendered in the above entitled cause on the fourth day of January, 1909," which was the date of the order denying a motion for a new trial, was sufficient to raise on appeal the final judgment which had been entered May 18, 1908. In *Hoiness* v. *United States*, 335 U.S. 297 (1948), this Court reversed a dismissal of appeal below

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cided to consider the case on its merits, stating: "it is difficult to see how either party would benefit by a reversal which would require the lower court to decide questions which, as pointed out, it apparently has decided." 119 F. 2d at 997.

which was based on a claimed deficiency in the notice of appeal. The only appealable order was the judgment of dismissal; the later order—the one specified in the notice of appeal—was not appealable. This Court held "that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U. S. C. (1946 ed.) § 777." *Id.* at 300 [15] See also *United States* v. *Arizona*, 346 U.S. 907 (1953), and *State Farm Mutual Automobile Insurance Co.* v. *Palmer*, 350 U.S. 944 (1956), where this Court in both instances granted certiorari and reversed, per curiam, dismissals of appeals below which were grounded on faulty notices of appeal.

Similar situations involving the effect of a faulty notice of appeal have arisen in cases decided in almost every federal judicial circuit, including the First Circuit. In each of these cases a notice of appeal was held sufficient to raise the final judgment on appeal although defective in that it referred, not to the judgment, but to some other, non-appealable order.

In *Nolan* v. *Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958), the notice of appeal was "from the order directing the

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[15] The repeal of section 777 does not affect the applicability of *Hoiness* to the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of section 777 was "covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239. After referring to the repeal in *Hoiness*, this Court said: "And see Rules 1, 15, 61 and 81 . . ." 335 U.S. at 300-301, n. 6. See also 28 U.S.C.A., Rule 61, Notes of Advisory Committee on Rules. Furthermore, 28 U.S.C. § 2111, in language similar to that of Rule 61, directs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

jury to return a verdict against the plaintiffs." The notice of appeal in *Railway Express Agency, Inc.*, v. *Epperson*, 240 F. 2d 189, 192 (8th Cir. 1957), was "from the order overruling defendant's Motion for Judgment or in the Alternative for New Trial . . ." In *Creedon* v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), and *United States* v. *Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954), Judge Magruder of the First Circuit did not permit faulty notices of appeal to prejudice appellant's right to have the judgment below reviewed. In *Best* the notice was "from the order denying the motion for rehearing," while in *Creedon* it was "from order denying plaintiff's motion for new trial." In denying appellee's motion to dismiss the appeal because of this faulty notice in *Creedon*, Judge Magruder said: "It is founded on pure technicality." [16]

In its petition for rehearing, plaintiff called this line of cases to the attention of the Court of Appeals. In denying rehearing the court attempted to distinguish the cases, saying that "the second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal" (R. 21). But clearly such a narrow and qualified statement of the issue in an attempt to distinguish cases that are, in principle, indistinguishable is error. Whether the intent to appeal is garnered from one notice or another, or, for that matter, from any pleading before the court, is, we submit, immaterial. What is

[16] See also *Sobel* v. *Diatz*, 189 F. 2d 26, 27 (D.C. Cir. 1951); *Conway* v. *Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz* v. *Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); and *Cheney* v. *Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Gunther* v. *E. I. DuPont DeNemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette* v. *N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

significant is that the intent to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and papers filed by the plaintiff.

In the *Hoiness* case, *supra*, this Court said:

> "It seems to us hypertechnical to say that the *appeal papers* did not bring the sole issue of the case fairly before the Court of Appeals." 335 U.S. at 301. (Emphasis supplied.)

The court in *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582, 583 (5th Cir. 1952), said:

> "While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears *from the record as a whole* that the intent was to appeal from the judgment, and that that intent should be given effect." (Emphasis supplied.)

The court in *United States* v. *Stromberg*, *supra*, n. 16, refused to dismiss an appeal although the notice referred only to denial of appellant's motions under Rules 52(b) and 59(a), saying that, "where it is obvious that the *overriding intent* was effectively to appeal, we are justified in treating the appeal as from the final judgment." 227 F. 2d at 904. (Emphasis supplied.)

Other courts have looked beyond the four corners of a faulty notice of appeal into the record of the case in determining the proper scope of appeal. In *Sun-Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (4th Cir. 1949), the court found an intent to appeal from the final judgment (despite a notice of appeal which referred only to denial of a motion for rehearing) by examining the

Statement of Points to be Relied Upon on Appeal as filed by appellant. In *DiGiovanni* v. *DiGiovannantonio*, 233 F. 2d 26 (D.C. Cir. 1956); the court took notice of the designation of the record on appeal in determining the scope of the appeal. And, as stated by the court in *Blitzstein* v. *Ford Motor Co.*, 288 F. 2d 738, 740 (5th Cir. 1961):

> "In overruling appellee's objections we reaffirm our view that in determining whether Rule 73(b) has been complied with, we may look to the statement of points and designation of contents of record on appeal."

In other cases Courts of Appeals have taken jurisdiction of appeals where no formal notice was filed as required by Rule 73. In *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939), the appellant filed appellee's acknowledgment of service of notice of appeal, her entry of appearance and the designation of the record on appeal, but failed to file a timely notice of appeal. Appellee accordingly moved to dismiss the appeal. In denying the motion the court held that appellant's actions were in complete accordance with the spirit of the rules and in substantial compliance with their letter. Chief Judge Hutcheson stated:

> "* * * [I]t would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. * * * Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks." 104 F. 2d at 38.

See also *Jordan* v. *United States District Court*, 233 F. 2d 362 (D.C. Cir. 1956), where a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal, and *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957), where an application made in the appellate court for leave to appeal in forma pauperis was held "an unequivocal notification of intention to appeal" and sufficient to confer appellate jurisdiction. See also *Burdix* v. *United States*, 231 F. 2d 893 (9th Cir. 1956), and *Rotl* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956).

Applying the precedents to the instant case, there can be no doubt that the intention to appeal from the district court's dismissal of the action is manifest from the record in the case. Indeed, this case is a stronger one on this issue of intention than some of those cited, since here plaintiff filed a notice of appeal (her first notice) specifically referring to the judgment of the district court dismissing the action. That such notice is held, whether correctly or erroneously, to have been nugatory because of premature filing does not detract from its force as a clear manifestation of plaintiff's intention to appeal from the judgment. The "appeal papers," the "record as a whole" and, indeed, the Statement of Points to be Relied Upon on Appeal (Pet. for Cert., App. D, p. 37) are eloquent of an overriding intention which the Court of Appeals disregards. In viewing the second notice of appeal *in vacuo*, as it were, the court has rendered a decision based upon a hypertechnical view of federal procedural requirements, in conflict with the decisions both of this Court and those of federal judicial circuits, and, in the words of Chief Judge Hutcheson, a decision "harking back to the formalistic rigorism of an earlier and outmoded time" and constituting "a travesty upon justice."

Finally, it would be well to note that in no wise has the defendant been misled or prejudiced by plaintiff's actions in appealing this case. Nowhere in her brief before the Court of Appeals does the defendant even raise the issue whether the judgment of the district court is properly before the Court of Appeals. And, if that Court felt compelled to resolve the issue by reference to strict and technical doctrines of appellate jurisdiction, it has relied on a concept which is out of place in the context of the instant case. "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *" *Cutting v. Bullerdick*, 178 F. 2d 774, 776 (9th Cir. 1949).

IV. The district court's dismissal of the complaint and its denial of plaintiff's motion to amend her complaint constitute reversible error.

In affirming the orders of the district court entered on January 23, 1961,[17] denying plaintiff's motions to vacate the judgment dismissing her complaint and to amend her complaint, the Court of Appeals has, in effect, held (1) that the proffered amendment set forth a new cause of action, "an independent matter" which was not set out in the original complaint (R. 21), and (2) that the district judge's denial of plaintiff's motion to amend her complaint did not constitute an abuse of discretion. Both holdings, we submit, are in conflict with the decisions of this Court and those of a number of Courts of Appeals, as well as in violation of the basic principles of federal procedure as

[17] The Court of Appeals erroneously refers in its mandate to the district court's orders entered January 26, the date of plaintiff's second notice of appeal.

articulated in the cases and the Federal Rules of Civil Procedure.

It would be well at this point to focus upon the facts pertinent to this aspect of the case. The complaint alleges an agreement whereunder plaintiff was to provide for the care of her mother and was to receive, in turn, upon the death of her father, her intestate share of his estate. (At his death this turned out to be two-thirds of approximately $60,000.) Plaintiff further alleges full performance of her part of the agreement by furnishing and paying for the care of her mother (Complaint, par. 3, R. 3), and prays for judgment in the amount of $40,000.

The proffered amendment to the complaint (R. 10) repeats the first paragraph of the original complaint (R. 2), claims a jury trial, and prays for judgment in the amount of $12,500, representing "monies paid by the plaintiff for and on behalf of the defendant, and for services rendered for and on behalf of the defendant . . ."[18] (R. 10).

Thus the only new matter contained in the amendment is a specification of the dollar amount claimed to be owed plaintiff for her services and expenditures and a prayer for judgment in that amount and for jury trial. Obviously, all the amendment sought to accomplish was the addition of a count in quantum meruit to what had been

[18] References to "defendant" are clearly intended to read "decedent." The defendant, who is being sued solely in her representative capacity (the case being actually entitled "Lenore Foman v. The Goods, Effects and Credits of Wilbur W. Davis, deceased, now in the hands of Elvira A. Davis, Executrix u/w of said Wilbur W. Davis"), obviously has no standing in the action save in such representative capacity. Although defendant bases an argument upon this obvious slip (Brief for Defendant, pp. 12-13), the Court of Appeals did not refer to it as a ground for its holding and, apparently, took this minor discrepancy for what it was.

a straight action for damages for breach of contract. To hold that damages based on quantum meruit cannot be obtained in an action for breach of contract, to deny permission to add such a count to the complaint, and to base these rulings on the characterization of the quantum meruit count as a new action or "independent matter" is manifest error. Plaintiff argues, *first*, that the quantum meruit count could properly have been recovered upon under the original complaint and that an amendment was therefore not necessary; and, *second*, that, if amendment is necessary or desirable, a refusal to grant leave to amend constitutes an abuse of judicial discretion.

A. The complaint seeking damages for breach of contract should not have been dismissed for failure to state a claim, since it contains an adequate basis for a quantum meruit recovery.

In *Friederichsen* v. *Renard*, 247 U.S. 207 (1918), the plaintiff, claiming to have been defrauded in an exchange of lands, brought suit in the district court to annul the contract and deed and for incidental damages. The court, finding that plaintiff had affirmed the contract by acts of ownership, transferred the case to the law side as an action for damages for deceit. The bill was appropriately amended to conform to a law action, adding a prayer for a judgment in damages, but effecting no substantial change in the allegations of fraud. Meanwhile the statute of limitations had run and, on this ground, the district court ordered a directed verdict in favor of the defendants. The Court of Appeals for the Eighth Circuit affirmed on the ground that the amended complaint set forth "a new action at law, directly opposed to the theory stated in the bill," and therefore the amended complaint did not relate back to the commencement of the action. 231 Fed. 882, 885.

This Court granted certiorari and reversed the decisions below, stating that it considered it settled—

> ". . . . that the conversion of a suit in equity into an action at law or *vice versa* is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case." 247 U.S. at 210.

But more in point and particularly apropos to the instant case is the following from 247 U.S. at 210:

> "But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while, in the amended petition, it is for damages alone. *The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.*" (Emphasis supplied.)

One of the grounds relied upon by the Court of Appeals in the instant case in characterizing the quantum meruit count as "an independent matter" from the original claim for damages for breach of contract is that it proceeded "upon a different theory" (R. 21). This was one of the grounds relied upon by the Court of Appeals in *Friederichsen, supra,* and the reversal of that case by this Court is eloquent of the invalidity of the "different theory" test. This is confirmed by *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933), where this Court, by Mr.

Justice Cardozo, held that a change in legal theory was no longer accepted as the test in determining whether a claim is a new action or whether it constitutes part of a pending action.

In *Hutches* v. *Renfroe*, 200 F. 2d 337, 341 (5th Cir. 1952), the court held that, where the facts alleged in a complaint entitle the plaintiff to certain relief, but such relief is not clearly prayed for, "it is the duty of the court to grant the relief to which the plaintiff is entitled, irrespective of the prayer for relief." And even where a defective theory of relief is pursued in the complaint, the court was "in no doubt that plaintiff is entitled to the relief to which the proven facts entitle him, even though his own legal theory of relief may have been unsound." 200 F. 2d at 340.

The Federal Rules of Civil Procedure require the same result. Rule 54(c) provides, in part:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Finally, it is anomalous to note that the holding of the Court of Appeals that a count in quantum meruit is "an independent matter" from an action for breach of contract is stricter and more technical than required even by the old rules of common-law pleading under the forms of action. Thus in *Parker* v. *Macomber*, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892), a case somewhat similar on its facts to the instant case, it was held that a declaration in an action of assumpsit not containing a count in quantum meruit was nevertheless sufficient as a basis for

recovering the value of services performed by the plaintiff pursuant to a contract although damages for breach could not, as such, be recovered under the facts of the case. See also *Norris* v. *School District in Windsor*, 12 Me. 293, 298 (1835). In 1 Chitty on Pleading, 353* (16th Am. ed. 1876), it appears:

> "Under an *indebitatus* count the plaintiff may recover what may be due him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are in no case necessary . . ."

This Court has recently stated the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The complaint in the instant case alleged a set of facts sufficient to support recovery on a quantum meruit basis, and the courts below erred, therefore, in dismissing it on the ground that it failed to state a claim.

B. A complaint seeking damages for breach of contract and drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit was dismissed as failing to state a claim by a district judge in that Circuit who refused to adhere to the decision; his subsequent denial of plaintiff's motion to amend the complaint by adding a count in quantum meruit constitutes a clear abuse of judicial discretion.

Even assuming that the complaint should have been amended, the denial of permission to amend constitutes abuse of discretion. Rule 15(a) requires that leave

to amend "be freely given when justice so requires." Again and again the various Courts of Appeals have made it clear that Rule 15(a) imposes a *duty* on the courts to allow a litigant to have his day in court by permitting him to correct a pleading in some respect deficient. Thus in *Dowdy* v. *Procter & Gamble Mfg. Co.*, 267 F. 2d 827 (5th Cir. 1959), Chief Judge Hutcheson said, assuming that the complaint failed to state a claim, yet the district judge was in error for dismissing the complaint without granting leave to amend. See also *Pioche Mines Consol., Inc.*, v. *Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336 (9th Cir. 1953): "In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge." *Id.* at 337. See also *Dunn* v. *J. P. Stevens & Co.*, 192 F. 2d 854, 856 (2d Cir. 1951). *Peterson Steels, Inc.*, v. *Simon*, 188 F. 2d 193, 196 (7th Cir. 1951).

In *Blake* v. *Clyde Porcelain Steel Corp.*, 7 F.R.D. 768 (D.C. S.D. N.Y. 1944), plaintiff filed a motion to amend his complaint, which made claim for moneys due but not paid under an employment contract. The proposed amendment, as in the instant case, sought to add a count in quantum meruit. In permitting amendment the district judge said: "Rule 15(a) states that 'leave' to amend 'shall be freely given when justice so requires', and if plaintiff has a valid cause of action upon any theory, he should be afforded opportunity to assert it." 7 F.R.D. at 769.

Cases involving alternative theories of recovery other than the contract-quantum meruit distinction of the instant case have recognized the duty of the district courts to permit amendment where, on the facts stated, plaintiff has a valid cause of action upon a theory not asserted in his

complaint. In *United States* v. *Frank B. Killian Co.*, 269 F. 2d 491 (6th Cir. 1959); an "ambiguous and poorly drawn" complaint, alleging a contract between the parties, stated: "This is a suit of a civil nature . . . under the Royalty Adjustment Act of 1942 . . ." In fact no such cause of action is provided for under that Act and, on that ground, the district court granted defendant's motion to dismiss the action. The Court of Appeals, citing Rules 8(f) and 54(c) and this Court's decision in *Conley* v. *Gibson*, noted that, since the pleading did mention the contract, which was the only basis for recovery, a dismissal of the poorly drafted pleading with leave to amend would have been unassailable; but, since no such leave was granted, the plaintiff should be permitted to file an amended complaint in conformity with Rule 8 and to proceed with the prosecution of the action on the basis of the contract.

McIntyre v. *Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949), *app. diss'd per curiam*, 184 F. 2d 671 (8th Cir. 1950), was an exploding bottle case, the plaintiff being the child of the purchaser of the soda pop, and theory of recovery resting on contract, *i.e.*, breach of the implied warranty of merchantability. In examining applicable state law, the district court found that there would probably be no recovery on the contract theory since this would require extension of the doctrine of implied warranty of merchantability to cover the donee of the vendee of the retail vendor as against the remote manufacturer, which it found an unlikely possibility. It did find, however, that recovery in tort would be permitted under state law. In refusing to dismiss the action, the district court granted leave to the plaintiff to recast the complaint in tort, stating:

> "Though plaintiffs have here cast the cause of action, stated in the complaint, as for breach of implied war-

> ranty, yet it clearly appearing that they have a claim against defendant, under Missouri law in tort, the first defense proffered by the defendant [failure to state a claim] must be denied. If the facts alleged in a complaint reveal that a plaintiff is entitled to any kind of relief, it is sufficient and should not be dismissed." 85 F. Supp. at 714.

In the instant case plaintiff is clearly entitled to recovery at least on a quantum meruit basis, and, if amendment is necessary or desirable, it was an abuse of discretion on the part of the district court to refuse to permit amendment of the complaint.

Unlike most situations, where the moving party must bear the burden of supporting his motion, a motion for leave to amend a pleading requires that the party *contesting* the motion demonstrate why the right to amend should *not* be granted. In *Weil Clothing Co.* v. *Glasser*, 213 F. 2d 296 (5th Cir. 1954), the trial judge refused to admit evidence of loss of profits as an element of damages for breach of contract on the ground that the matter was not covered in the complaint, and he denied permission to amend the complaint. In reversing the district court the Court of Appeals, noting Rule 15(b), which deals with amendments during trial, states that, when a motion for leave to amend is filed, the burden is put upon the other party to satisfy the court that the admission of evidence and amendment of pleadings would prejudice him in maintaining his defense upon the merits. In *South Suburban Safeway Lines, Inc.*, v. *Carcards, Inc.*, 256 F. 2d 934 (2d Cir. 1958), the district court had dismissed an involuntary petition in bankruptcy on the ground that it was "defective for vagueness." The Court of Appeals considered two issues: (1) Whether the petition was so vague as to be defective and (2), assuming

such vagueness, whether the district court should have permitted amendment rather than dismissing the petition outright. On this second issue the court stated:

> "The record in the instant case does not disclose any factors which would justify the district court in refusing to permit amendment of the petition by the appellants and we believe they should be allowed to amend the petition." 256 F. 2d at 936.

In the instant case there was no showing whatever by the defendant of any reason why amendment of the complaint should not have been allowed. Indeed, the courts below seem not to have asked for any such reason; rather, the matter is summarily disposed of by erroneously characterizing the quantum meruit count as "an independent matter" (R. 21). There is no opinion by the district court explaining its denial of leave to amend; and, on this basis, the Court of Appeals finds "nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" and it cannot say, therefore, that the district court abused its discretion (R. 15). Nowhere is there a mention of Rule 15 or a discussion of plaintiff's rights under that rule. Even before the advent of the Federal Rules, this Court had "fixed the limits of amendment with increasing liberality." *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). The courts below have, we submit, acted in disregard of the letter and the spirit of Rule 15.

If extenuating circumstances are necessary before an amendment may be allowed—and we vigorously deny that such is the law—then such circumstances were clearly presented in this case and should have been noticed by the

Court of Appeals. From the memorandum of decision of the district judge (R. 6, esp. 8) as well as the briefs submitted by both parties it was clear that, in framing her complaint, the plaintiff relied on a decision of the First Circuit which stood unreversed, *Cleaves* v. *Kenney*, 63 F. 2d 682 (1933). Plaintiff could assume that a district judge in the Circuit would consider himself bound by that decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that plaintiff be given leave to amend?

Even where not strictly bound to do so, this Court has, when declaring a sudden change in law or settling a previously unsettled question, exercised its sound judicial discretion to give the litigant prejudiced a second chance. See *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U.S. 579 (1941),[19] and *Rorick* v. *Board of Commissioners of Everglades Drainage Dist.*, 307 U.S. 208 (1939).[20] Such a chance, by permitting amendment of the complaint, should have been granted to the plaintiff herein, and denial of leave to amend and the affirmance of such denial constitute clear abuses of judicial discretion calling for reversal by this Court.

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[19] "[I]t would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, *supra*. . . ." 311 U.S. at 582-583.

[20] "Since the time for appeal to the Circuit Court of Appeals has expired, and since the jurisdictional problem determined in this case had not been fully settled prior to this decision, we will not terminate the litigation by dismissing the appeal but . . . we will order the decree vacated and the cause remanded to the district court for further proceedings . . ." 307 U.S. at 213.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgments of the courts below should be reversed and the case remanded to the Court of Appeals with instructions to:

(1) Review on the merits the district court's judgment of dismissal entered December 19, 1960, by determining the issue whether recovery may be had on the express oral contract as pleaded in the original complaint, and thereafter to—

(2) Remand the case to the district court for a trial of the action on a quantum meruit theory of recovery and for such other proceedings as shall be proper, in accordance with the determination by the Court of Appeals of the issue above stated.

Respectfully submitted,

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